Supreme Court, U.S.
FILED
OCT 20
OFFICE OF THE CLERK

No. 00-285

In The

Supreme Court of the United States

SAM B. McQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COMMISSION),

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of South Carolina

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

KENNETH B. BLEY
(Counsel of Record)
COX, CASTLE & NICHOLSON LLP
2049 Century Park East, 28th Floor
Los Angeles, CA 90067
(310) 284-2231

[ADDITIONAL COUNSEL LISTED INSIDE FRONT COVER]

19pp

MARY DiCRESCENZO
THE NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0250

DAVID CHRISTIAN SMITH
THE BUILDING INDUSTRY LEGAL
DEFENSE FOUNDATION
1330 South Valley Vista Drive
Diamond Bar, CA 91765
(909) 396-9993

Attorneys for Amici Curiae
THE NATIONAL ASSOCIATION OF HOME BUILDERS and THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION

TABLE OF CONTENTS

Page

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.....1

THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO ENSURE THAT THEIR RIGHT TO RECEIVE JUST COMPENSATION IS NOT LOST THROUGH THE MERE PASSAGE OF TIME.....1

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....5

I. THE RULE FOLLOWED BY THE SOUTH CAROLINA SUPREME COURT WILL DEPRIVE A SUBSTANTIAL NUMBER OF LANDOWNERS OF THEIR RIGHT TO JUST COMPENSATION IF IT IS ALLOWED TO STAND.....5

II. CONCLUSION.....10

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Agins v. City of Tiburon,
447 U.S. 255 (1980) 2

Bowles v. United States,
31 Fed. Cl. 37 (1994) 5

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999) 2

Deltona Corp. v. United States,
657 F.2d 1184 (Ct. Cl. 1981),
cert. denied, 455 U.S. 1017 (1982) 6

Dolan v. City of Tigard,
512 U.S. 374 (1994) 2

Forest Properties, Inc. v. United States,
39 Fed. Cl. 56 (1997) 6

Good v. United States,
189 F.3d 1355 (Fed. Cir. 1999),
cert. denied, 120 S.Ct. 1554 (2000).....6

Loveladies Harbor, Inc. v. United States,
28 F.3d 1171 (Fed. Cir. 1994) 6

TABLE OF AUTHORITIES (Cont.)

Page(s)

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 4, 5

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340 (1986) 2

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 2

Palm Beach Isles Associates v. United States,
208 F.3d 1374 (Fed. Cir. 2000) 7

Rindge Co. v. Los Angeles County,
262 U.S. 700 (1923) 7

San Diego Gas & Electric Co. v. City of San Diego,
450 U.S. 621 (1981) 2

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 2, 6

Summa Corp. v. California ex rel. State Lands Commission,
466 U.S. 198 (1984) 7

United States v. 198.73 Acres of Land,
800 F.2d 434 (4th Cir. 1986 10

TABLE OF AUTHORITIES (Cont.)

Page(s)

Wetlands Action Network v. United States Army Corps of Engineers, 222 F.3d 1105 (9th Cir. 2000) 7

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 2

STATE CASES

AVCO Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976), *app. dismissed and cert. denied*, 429 U.S. 1083 (1977) 6

Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) 9

Erb v. Maryland Department of Environmental Protection, 110 Md.App. 246, 676 A.2d 1017 (1996) 5

Gerhard v. Stephens, 68 Cal. 2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968) 9

TABLE OF AUTHORITIES (Cont.)

Page(s)

Karam v. State of New Jersey, Department of Environmental Protection,
308 N.J. Super. 225, 705 A.2d 1221 (1998), *aff'd mem.*, 157 N.J. 187, 723 A.2d 943, *cert. denied*, 120 S.Ct. 51 (1999) 8

Landgate v. California Coastal Commission,
17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188, *cert. denied*, 525 U.S. 876 (1999) 10

Mannheim v. Superior Court,
3 Cal.3d 678, 91 Cal.Rptr. 585, 478 P.2d 17 (1970) 10

Mayhew v. Town of Sunnyvale,
964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) 8

People v. Rindge,
174 Cal. 743, 164 P. 633 (1917) 7,8

State of Florida, Department of Environmental Protection v. Burgess,
2000 WL 889840 (Fla.App. July 6, 2000) 8

FEDERAL STATUTES

33 U.S.C. § 1344 5

TABLE OF AUTHORITIES (Cont.)

Page(s)

TREATISES

1 *C.J.S., Abandonment,* § 7.b, *Subjects of abandonment, Real property and rights or interests therein* at 14 (1985 and 2000 Cum. Annual Pocket Part) 9

11 *Thompson on Real Property*, § 91.07, *Title by Abandonment* at 23 (Thomas ed. 1994 and 2000 Cum. Supp.), ...9

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received the parties' written consent to file this brief as amici curiae in support of the petitioner and have filed the letters of consent with the Clerk of the Court.[1]

THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO ENSURE THAT THEIR RIGHT TO RECEIVE JUST COMPENSATION IS NOT LOST THROUGH THE MERE PASSAGE OF TIME

The NAHB represents over 200,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members when, as in the case at bar,

---

[1] No counsel for either party authored any part of this brief. No person or entity other than the NAHB and the BILD Foundation made any monetary contribution to the preparation or submission of this brief.

governmental action which has deprived them of all viable economic use of their land is held immune from the remedy provided by the Just Compensation Clause merely because the landowner did not immediately begin development.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent member of the NAHB, whose 1,800 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

---

[2] The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

The NAHB and the BILD Foundation submit their amici curiae brief in support of the petitioner in the present case to convince the Court to grant its writ of certiorari because, at bottom, the question is whether a landowner who has not made use of his or her land for some period of time has effectively abandoned the land and is therefore not entitled to recover the Just Compensation required by the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, where governmental action deprives the landowner of all viable economic use.

SUMMARY OF THE ARGUMENT

Landowners may leave their land undeveloped for various lengths of time depending on their individual needs and desires. Governmental action can prohibit all economically beneficial use and leave the land with no value. Normally, this would result in a taking which would require the payment of the constitutionally mandated Just Compensation. The South Carolina Supreme Court has held that the mere passage of time can provide an absolute shield for that governmental action and relieve the government of paying Just Compensation.

The idea that landowners are exposed to a "use it or lose it" rule of law is both bad law and bad policy. It will force landowners to develop their land quickly because of the fear that delay may mean the loss of all economically beneficial use without the possibility of receiving Just Compensation.

It will force courts to spend precious judicial resources trying to figure out how long is too long. No

one – not the landowner nor the government – will know before trial is over and the appellate review process is finished whether the landowner waited too long or whether the government is liable for the payment of Just Compensation.

Black letter law may be simplistic but it does have its place and this is one of them. Everyone – landowners, government and, not least, courts – should know that the length of time between the purchase of land and its development is not relevant when governmental action has deprived the land of all economically beneficial use. A court is simply not justified in denying Just Compensation because the landowner waited before developing his or her land. Investment-backed expectations should not be defeated because of a landowner's desire or, in many cases, need to wait to begin development.

This Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), laid down a categorical rule that governmental action which deprives land of all economically beneficial use constitutes a taking for which constitutionally mandated Just Compensation must be paid. This Court's definitive statement whether the mere passage of time can strip landowners of their right to receive Just Compensation – whether the rule is to be that a landowner must either use the land or, for all practical purposes, lose it – is needed to ensure that all landowners in the United States know precisely what they must do – or need not do – in order to prevent governmental actions from depriving them of all economically beneficial use of their land without being required to provide the constitutionally mandated Just Compensation. If *Lucas's* categorical rule bears a use-by

date, this Court should tell us so which, in turn, requires that Mr. McQueen's petition for certiorari be granted.

ARGUMENT

I. THE RULE FOLLOWED BY THE SOUTH CAROLINA SUPREME COURT WILL DEPRIVE A SUBSTANTIAL NUMBER OF LANDOWNERS OF THEIR RIGHT TO JUST COMPENSATION IF IT IS ALLOWED TO STAND

Governmental action which deprives land of all economically beneficial use constitutes a taking of the land and the Constitution mandates that the government pay the landowner Just Compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The South Carolina Supreme Court's decision, if it is allowed to stand unreviewed, will, in all too many cases, override *Lucas* because land frequently remains undeveloped for some period of time before the landowner decides to develop it. Landowners come in all shapes and sizes so, not surprisingly, the delays between acquisition and development may be anywhere from days to centuries.

Individuals buy land for their own use. Sometimes they will act almost immediately after the purchase. *Bowles v. United States*, 31 Fed. Cl. 37 (1994)(purchase of a vacant lot for a retirement house and submission of an application for a § 404 permit under the Clean Water Act, 33 U.S.C. § 1344, in the same year). Sometimes they wait a few years. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)(two years between purchase and enactment of the Beachfront Management Act which

resulted in a taking), and *Erb v. Maryland Department of Environmental Protection*, 110 Md.App. 246, 676 A.2d 1017 (1996)(eight years between acquisition of family land, held since the 1920s, and application for a septic tank permit).

Some individuals have waited substantially longer before seeking to develop their land. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997)(15 years between purchase of the land and submission of a development application for a single house). Mr. McQueen waited 30 years. (Pet. App. at 1a-2a.)

Developers of large projects also wait for varying lengths of time before beginning to develop their land although, the approval process being what it is, the time is generally a matter of several years at a minimum. *AVCO Community Developers, Inc. v. South Coast Regional Commisssion*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976), *app. dismissed and cert. denied*, 429 U.S. 1083 (1977)(four years between purchase and enactment of the California Coastal Zone Conservation Act of 1972), *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S.Ct. 1554 (2000)(eight years between purchase of the land and application for a § 404 permit), and *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982)(nine years between purchase of the land and submission of a development application in a multiphase development).

Time measured in decades is not at all uncommon. *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56 (1997)(18 years between purchase of the land and submission of a development application), *Loveladies*

Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)(24 years between purchase of the land and denial of § 404 permit in a multi phase development), and *Palm Beach Isles Associates v. United* States, 208 F.3d 1374 (Fed. Cir. 2000)(32 years between purchase of the land and application for state wetlands fill permit).

It is even possible for land to remain undeveloped for over a century before the landowner decides to develop it. Playa Vista, the largest development project in the City of Los Angeles, is currently being developed on land that was originally acquired by patent from the Spanish government in 1839. *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 202 (1984). Planning for development on the land did not even begin until 1979 and an application for a § 404 permit wasn't submitted until 1990. *Wetlands Action Network v. United States Army Corps of Engineers*, 222 F.3d 1105, 1110-1111 (9th Cir. 2000).

Landowners change their mind from time to time as to what they wish to do with their land. The owners of what is now Malibu, a portion of Los Angeles County known through out the world as the home of the rich and famous, asked the County to open a public road through their property in 1885 but later changed their minds. *People v. Rindge*, 174 Cal. 743, 164 P. 633 (1917). Indeed, the owners fought to avoid having a road condemned over their land. *Rindge Co. v. Los Angeles County*, 262 U.S. 700 (1923).

Clearly, the Rindges did not want to develop their land; it remained undeveloped, used only for ranching, for

half a century after Matthew Keller acquired it in 1882. *People v. Rindge, supra,* 174 Cal. At 746, 164 P. at 635.

The Mayhews bought 850 acres of land for ranching purposes between 1941 and 1965 and an additional 346 acres in 1985 and 1986 when they decided to develop a minimum of 3,600 houses. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999).

The Schweinerts bought land from New Jersey in 1924, sold off pieces over the years and, in 1993, sold off a piece to the Karams who immediately applied for a dock construction permit. *Karam v. State of New Jersey, Department of Environmental Protection*, 308 N.J. Super. 225, 705 A.2d 1221 (1998), *aff'd mem.*, 157 N.J. 187, 723 A.2d 943, *cert. denied*, 120 S.Ct. 51 (1999).

If the rule laid down by the South Carolina Supreme Court is a correct statement of the law, then the Rindges, the Mayhews and the Karams would all be denied Just Compensation simply because either they or their predecessors in interest had waited too long or, in the case of the Rindges and the Mayhews, had no investment backed expectations suitable for constitutional protection because they had used their land for other purposes and, government could argue, had abandoned any claim to more intensive use of their land. See, e.g., *State of Florida, Department of Environmental Protection v. Burgess,* 2000 WL 889840 (Fla.App. July 6, 2000)(no reasonable investment-backed expectation for change in use when landowner had used land for nature walks and fishing for 32 years before applying for a state wetland fill permit).

The common law, in California and generally, is that real property cannot be abandoned. *Gerhard v. Stephens*, 68 Cal.2d 864, 883, 69 Cal.Rptr. 612, 628, 442 P.2d 692, 708 (1968)("... many California cases have declared that a *fee simple* interest in *real property* may not be abandoned.")[italics in the original]. *See generally*, 11 *Thompson on Real Property*, § 91.07, *Title by Abandonment* at 23 (Thomas ed. 1994 and 2000 Cum. Supp.), and 1 *C.J.S.*, *Abandonment*, § 7.b, *Subjects of abandonment, Real property and rights or interests therein* at 14 (1985 and 2000 Cum. Annual Pocket Part).

The practical effect of the ruling by the South Carolina Supreme Court, if it is allowed to stand, will be equivalent to a rule of law that holds that a landowner has abandoned his or her land if development is not begun and rights vested before the law changes to the landowner's detriment. This would be a substantial change in the law, one which, if it is to become the law (and it should not), should come from this Court.

Title will presumably remain vested in landowners such as Mr. McQueen but what is bare title worth if no use is allowed and no Just Compensation must be paid? *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938)(the only difference between outright confiscation and an overly burdensome restriction on use "is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.").

Again, the practical effect will be an escheat to the State, something which, like abandonment, is disfavored by the common law in California and generally.

Mannheim v. Superior Court, 3 Cal.3d 678, 691, 91 Cal.Rptr. 585, 592, 478 P.2d 17, 24 (1970), and *United States v. 198.73 Acres of Land*, 800 F.2d 434, 435 (4th Cir. 1986).

The concerns expressed above are important for landowners throughout the United States but of even greater importance for those in California where the courts have come up with ways to avoid finding that a taking has occurred. See, e.g., *Landgate v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188, *cert. denied*, 525 U.S. 876 (1999)(denial of all viable economic use resulting from a mistaken interpretation of the law cannot result in a taking).

II. CONCLUSION

The NAHB and the BILD Foundation respectfully request that this Court grant Mr. McQueen's petition for writ of certiorari.

DATED: October 20, 2000

Respectfully submitted,

Mary DiCrescenzo
The National Association
Of Home Builders

David Christian Smith
The Building Industry
Legal Defense Foundation

Kenneth B. Bley
(Counsel of Record)
COX, CASTLE &
NICHOLSON LLP
Attorneys for Amici Curiae
The National Association of
Home Builders and The
Building Industry Legal
Foundation